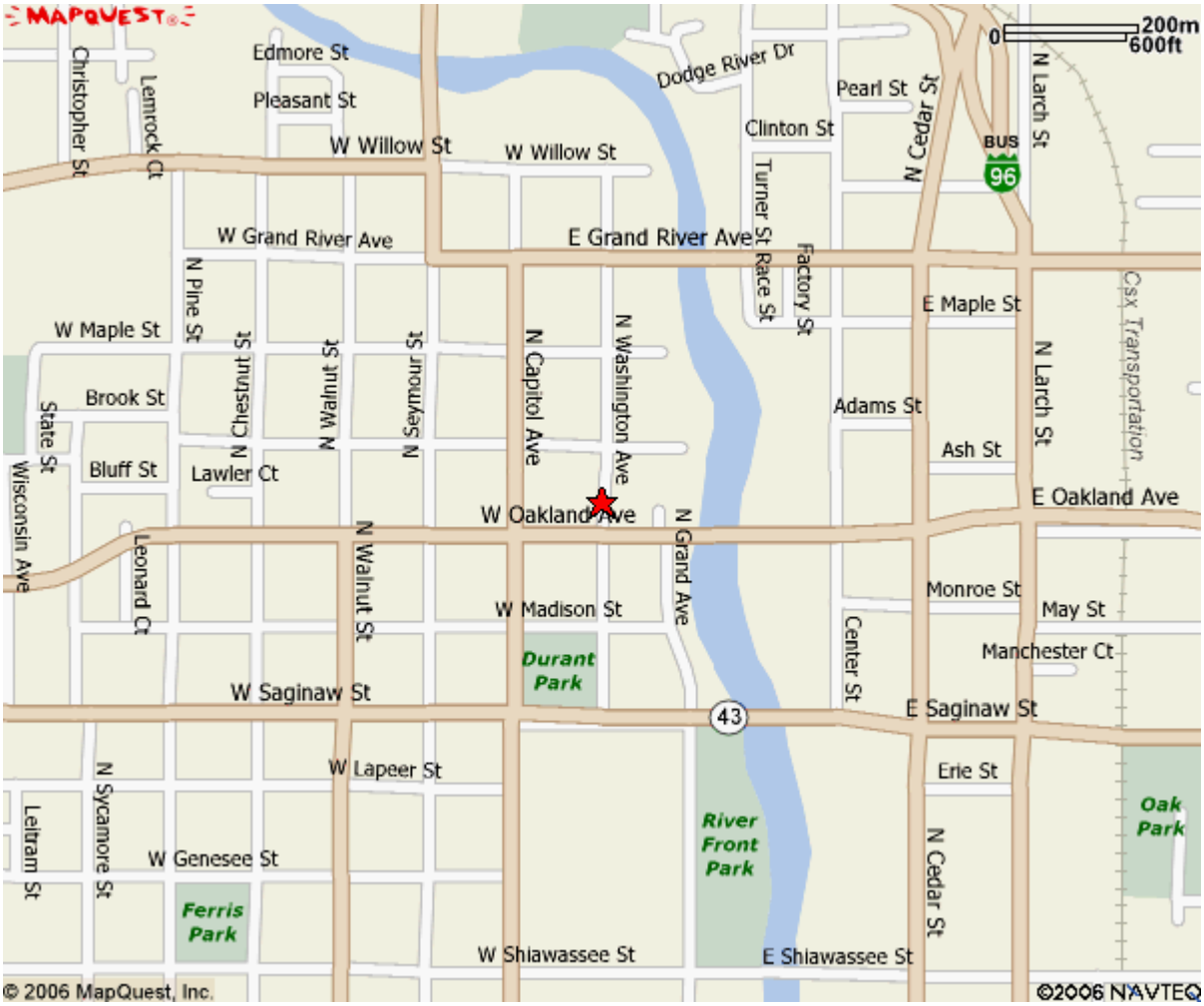
A G E N D A

PART 201 DISCUSSION GROUP
Administration Subgroup
Tuesday, February 20, 2007
Michigan Association of Counties Headquarters
935 N. Washington Avenue
Lansing, Michigan 48906
Tel: (800) 258-1152

9:00–9:10	Welcome and introductions	Julie Bennett *Public Sector Consultants*
9:10–9:45	Permit model discussion	Alan Wasserman
9:45–10:15	Update on progress in other workgroups	Julie Bennett *Public Sector Consultants*
10:15–11:45	Review and discuss recommendations (based on homework compilation document)	All
11:45–12:00	Next steps, next meeting date, and adjourn	All

935 N Washington Ave
Lansing MI
48906-5137 US

Notes:



Part 201 Administration Workgroup Recommendations

The original Part 201 Discussion Group concluded that there is a need to optimize Michigan Department of Environmental Quality (MDEQ) administration of the Part 201 program in order to enhance the credibility of the program and achieve program objectives. To that end, it charged the Part 201 Administration Workgroup with making recommendations to improve internal MDEQ processes and program administration in order to (a) increase meaningful risk reduction as measured through redevelopment and/or RAPs/IRDCs/Due Care response activities implemented, and (b) establish effective methods and indicators that can be used to measure and benchmark progress.

The Administration Workgroup developed six priority goals related to program administration:

- Reduce adversarial interaction between stakeholders and MDEQ
- Create incentives for source removal
- Streamline the administration process
- Outsource MDEQ responsibilities
- Improve site prioritization methods
- Establish effective methods and indicators that can be used to measure and benchmark progress

The goals and recommendations for achieving them are described below.

REDUCE ADVERSARIAL INTERACTION BETWEEN STAKEHOLDERS AND MDEQ

Group members have indicated that there is some conflict between the public health protection goals of the MDEQ and the redevelopment interests of the regulated community under Part 201. Often, there are nonliable parties that are attempting to get a cleanup completed and approved in order to redevelop a site. These nonliable parties have expressed concern that the Part 201 program treats everyone the same, and they often feel as though the MDEQ sees them as an adversary. To address the perceived adversarial nature of interactions, the workgroup has made the following suggestions:

- **Early scoping meetings** would be a useful way to bring the MDEQ and the constituents it regulates together and exchange information about the cleanup process. The regulated party would bring all available information about the site to the meeting, and the MDEQ would be encouraged to bring a checklist-style document to explain what must be done for the cleanup to meet established criteria. Concurrently, MDEQ staff with a statewide perspective, such as current members of the Quality Review Team (QRT), would be involved as resource people in the early scoping meeting. This approach would reduce adversarial interactions because it shifts the role of the MDEQ from assessing cleanup adequacy to facilitating the cleanup process.

In addition, group members contend that for an early scoping meeting to have any value there must be decision-making ability at the table. Decisions must be consistent across the state, and must not be a function of the individual project manager assigned to the project. It is important for decisions made early in the cleanup process to be upheld throughout the process. Empowering district staff to make decisions that will be upheld throughout the process is one solution. Another is involving a QRT-level individual throughout the process to ensure continuity.

- **Training** for MDEQ staff in nonadversarial interaction. While there are situations in which parties are not cooperative and an adversarial relationship is unavoidable, MDEQ staff could benefit from training to emphasize the notion that RRD's function is to work in partnership with the regulated community to increase levels of overall compliance, and emphasize the importance of facilitating brownfield redevelopment.
- **Change the focus of the QRT** from direct involvement in decision making to capacity building for consistent decision making at the district level.
- **Inviting the regulated party to the QRT meeting** to allow for exchange of information might improve the working relationships between parties and advance dialogue overall. This "open door" approach could improve the quality of information exchange and allow the consultant and company to fully understand the MDEQ's decisions.

CREATE INCENTIVES FOR SOURCE REMOVAL

There is wide support for development of incentives to increase the use of source removal in cleanups. It is likely that source removal provides the most effective protection for public health and it may be the most cost-effective response tool in the long run. One of the major challenges associated with source removal is the cost. Because source removal is so expensive, most parties spend small incremental amounts over a long period of time, which may add up to more than the cost of initial source removal. To address this challenge, the workgroup has made the following suggestions:

- A **low-interest loan program** could help parties finance their up-front source removal costs and match their business needs for small incremental costs over time. This approach may encourage source removal by creating a tool that is sensitive to the budget or operational philosophy of a business.
- **Allow monitoring costs to be avoided** if source removal can be documented and certified. Monitoring costs represent a large, ongoing financial burden associated with cleanups. Providing an avenue to avoid those monitoring costs by proving that the source has been adequately eliminated might be enough incentive to encourage source control.
- Developing a **common definition of source control** is a necessary step in the process of developing incentives. For example: "Source control is destruction, containment, or recovery of high concentrations of hazardous substances that would otherwise result in continued substantial expansion of the extent of contamination."

STREAMLINE THE ADMINISTRATION PROCESS

Group members have suggested that the process of administering Part 201 must be made more efficient. Concern has been expressed that there are roadblocks in the program administration that hinder the goals of Part 201. Concepts that may achieve improvements in efficiency follow.

- The ability of **district staff to make key, consistent decisions** is an essential element in improving the process.
- **District staff must have measurable means for tracking decisions** and quantifying productivity.
- **Map the current Part 201 process** to locate the current inefficiencies and direct resources for improvements.
- **Change the role of the QRT to advisory**. The team should be involved throughout the process offering guidance and providing baselines for consistent decision making at the district level, rather than playing an integral role in decision making.
- Create an **ombudsman** position in MDEQ to steer projects through the Part 201 program. The person would monitor the flow of projects in the program, identify problem areas, and work internally to address those problems.

OUTSOURCE MDEQ RESPONSIBILITIES

Outsourcing some MDEQ responsibilities to licensed professionals in the private sector is recommended to reduce MDEQ workload, improve timeliness in the decision-making process, create a less adversarial relationship between the regulated and regulating communities, and allow MDEQ staff to focus time and resources on the complex sites that pose the largest risk to the public. The recommendations that follow should be implemented with respect to outsourcing.

- Consultants would need to be **certified**.
- Consultant **costs** would be transferred to the responsible party. This would facilitate faster reviews of submittals and hopefully more consistent outcomes.
- The consultant hired by the responsible party would be **liable** for the adequacy of the investigation or remediation. Transferring liability to the consultant would address the problems associated with the Michigan LUST (Leaking Underground Storage Tank) program where Certified Underground Storage Tank Professionals complete inadequate work just to get hired.
- A **peer review system** would be established for review of plans that appear to be deficient, limiting peer reviews to only problem reports.
- **Penalties** would need to be established by the state for negligence, gross errors, and omissions. The MDEQ would **audit** projects and come down hard on professionals who are negligent.
- The licensed professionals would be required to participate in a **state-operated insurance fund** which would pay for future costs associated with inadequate characterizations or remediations, and tie the insurance premium to the professional's past performance. This would preclude fly-by-night professionals from participating and would provide an incentive to the professionals to complete projects correctly.

This would also give the responsible party a sense of finality since any costs incurred after closure of an issue (due to inadequate characterization or remediation) would be paid for out of the fund.

IMPROVE SITE PRIORITIZATION METHODS

The number of contaminated sites regulated under Part 201 is much greater than MDEQ resources can address. Site prioritization is key to managing this workload. Currently, MDEQ staff has no meaningful way of prioritizing non-state-funded sites. There appears to be little value received for the program investment in **site scoring**; therefore, the requirement should be removed from the statute. Instead, the following **site prioritization criteria**, which are currently being used by MDEQ for state-funded sites, should be considered:

- Availability of funding (i.e., is there a liable party who has the means to fund the cleanup?)
- Existence of current human exposure (e.g., contaminated drinking water supply or fire, vapor, and/or explosion hazard)
- Existence of imminent human and/or environmental exposure and the degree of hazard posed to the public health and/or environment
- Need to maintain or support previous investment (e.g., operation and maintenance of an existing treatment system)
- Readiness of project (e.g., no property access issues, etc.)
- Redevelopment potential as measured by location, level of government interest, level of interest from developers, and current infrastructure
- Geographic distribution

ESTABLISH EFFECTIVE METHODS AND INDICATORS THAT CAN BE USED TO MEASURE AND BENCHMARK PROGRESS

An area that holds the greatest potential for improving Part 201 program effectiveness/efficiency is instituting a process for tracking progress and success. The following recommendations should be implemented with respect to measuring and benchmarking progress.

- A single geographic point must be assigned to identify the **location** of a given incident or occurrence of conditions constituting a “facility” as currently defined by Part 201, and file or other materials be used to describe the geographic extent of the incident (to the extent such information is needed by any given party). The terms “Facility” and “Site” have both been applied to such conditions by the program, and each remains defined and used in the statute. This situation, as well as the use of property units with assigned tax ID numbers to identify locations encompassed by Baseline Environmental Assessments, often results in significant variation (and misunderstanding) as to what constitutes a given area subject to the obligations of Part 201.

  Multiple contaminant release events that occur concurrently or in close proximity both temporally and/or geographically should be identified as a singular incident to be

tracked. Only incidents of distinctly different geographic origin should be identified as different cases to be tracked (and addressed), even if located within the same unit of property currently legally described and assigned a unique tax ID number, or having other common features (similar mechanism of release, similar owner/operator, etc.).

- To **track the effectiveness** of Part 201, the following indicators should be used:
  - **Part 201 incident/case/release status** (as identified by the following key milestones):
    - Release Terminated: The activity which is or was occurring that placed hazardous substances into the environment in an inadequately controlled and contained manner has ended.
    - Source Area Mass Controlled: Destruction, containment, or recovery of high concentrations of hazardous substances that would otherwise result in continued substantial expansion of the extent of contamination.
    - Exposure Risks/Hazards Abated: Mitigation of potentially unacceptable exposures and hazards has been accomplished. We suggest two levels of this be tracked: first, those currently posed by a case, and second, those that may exist in the future (due to expansion of contamination and/or increased access to contaminated resources).
    - Resource Damage Repaired/Abated: Resource quality has been restored due to full cleanup of impacted soil, groundwater, and/or surface water sediment.
  - Acres of property restored to new productivity should be used to document the effectiveness of the brownfield redevelopment program.
  - Others?
- To **measure and communicate progress to the public,** the DEQ should adopt clear program benchmarks such as those discussed above and post such information in a publicly available electronic format.
- There is substantial value in maintaining a comprehensive **inventory** of cases subject to program requirements along with their status.

FOR DISCUSSION ONLY
Prepared for Part 201 Discussion Group
Liability Committee
Rev. 1.0, Date: October 16, 2006
Prepared by Alan D. Wasserman

Liability Committee

Issue	Reference	Discussion
BEA/Due Care Process	Liability (10/19)	A permit replaces "BEA" for liability protection, and specifies in an enforceable way, with notice, the continuing due care obligations.
Notice of brownfield activities to Liable Parties	Liability (10/19)	Permits would be subject to general notice provisions as are other permits. Specific notice can and should be required to Liable Parties if known, at time a Use/Occupancy permit is obtained.
Notice of Institutional Controls	Liability (10/19)	A permit would provide the notice and organic provisions that a permittee must comply with. This would provide notice and ongoing compliance duty
Intervening non-liable owners	Liability (10/19)	Would not have to obtain a permit once it transacted the property. No continuing obligation, since those would be shared between current permit holder and liable parties (if any)
Continued review of BEA by DEQ	Liability (10/19)	DEQ would have a role in any permit, and a permit replaces the BEA. A "general permit" may have less site-specific review.
Disclosure MDEQ during transaction	Liability (10/19)	There would be no more undisclosed sites. Any site that needs a permit would be in the permit system, and can be identified during a transaction screen.
Liable Party v. Brownfield and State owned sites cleanup standards	Liability 10/19	Remediation Permit would contain more requirements than a Use/Occupancy permit. Non-liable parties can elect to get an RP, but it would not be required. UOP is due care, not remediation.
Are Due Care obligations appropriately defined?	Liability 10/19	A shift to a permit paradigm allows for a change in the way due care is defined, but the topic of what is appropriate "due care" STILL NEEDS TO BE NAILED DOWN.
Long term performance of due care	Liability 10/19	Permit provides for specific and continuous method for assuring due care is identified and that the right person knows what he or she must do. These obligations will continue through subsequent permits.
How to handle previous determinations?	Liability 10/19	Can be converted to UOP permit.
Section 14 duties	Liability 10/19	If a new site is created or discovered, the permit obligation for and RP commences. If a permit is obtained, the condtions in the permit can address

		each of the affirmative obligations in Section 14.
Compliance – use of fines and penalties	Attachment B 1(b)	Enforcement of the obligation to obtain a permit and then for failure to meet permit obligations is more straightforward. Can and should incorporate fines and penalties to secure compliance. Focus is on Liable Parties to do work rather than on cost recovery
Compliance – site identification	Attachment B 1(b)	Permit requirement for all sites of contamination plus existing transaction screen process will provide notice to DEQ of all sites subject to permit.
Compliance – reduction in time and resources needed to identify LP	Attachment B 1(b)	Permit requirement changes complicated cost recovery action into something simpler, does not require expenditure of resources to recover costs. Permit system can include ability of any person to enforce (like under CWA or CAA).
Compliance – reporting/disclosure	Attachment B 1(b)	Permit system includes reporting obligations. By setting objectives and criteria, permit requirements can be somewhat self-implementing.
Compliance – Use of CERCLA	Attachment B 1(b)	Not addressed by permit paradigm
Compliance – what is "diligently pursue"	Attachment B 1(b)	Permit specifies requirements and time frames. Removes ambiguity.
Finality – Need to assure continuous response is balanced with finality	Attachment B 1(c)	Permit becomes the "finality" endpoint. Once you have a permit, not subject to fines and penalties asl long as in compliance. Ongoing response activities are covered by permit. On-going permit requirement can terminated upon "completion" of response activities. Long-term controls (barriers, use restrictions) will be carried in future permits.
Finality – Liability Release for completed cleanups	Attachment B 1(c)	The permit requirement terminates when the criteria identified have been met. On-going maintenance/use restrictions would be the obligation of the current owner/operators. Does this help the problem?
Balance of risk-sharing between regulated parties and the public	Attachment B 1(c)	Permit model protects public through response activities and due care. Liable party must do response activity and maintain it, users have to have a permit that establishes due care. Public is protected against residual risk.
Eliminate RAP? Replace with ?	Attachment B 1(c)	Remediation permit replaces RAP.

FOR DISCUSSION ONLY
Prepared for Part 201 Discussion Group
Liability Committee
Rev. 1.0, Date: October 16, 2006
Prepared by Alan D. Wasserman

Brownfield Committee

Issue	Reference	Discussion
Partnerships	Brownfields 10/16	Unclear if permit process offers opportunity to improve interagency coordination
Unified Application Format	Brownfields 10/16	A permit system simplifies *some* of the problems, but only as they relate to the elements that must be met to obtain a permit. However, a permit application and or permit can have some use in standardizing environmental information transmitted to various agencies.
Response Time	Brownfields 10/16	Permit system can (if done correctly) reduce the time it takes for development of a document regarding environmental compliance issues. Simple environmental projects can qualify for general permits.
Staff Training	Brownfields 10/16	Permit system will probably complicate staff training.
MDEQ Facilitators	Brownfields 10/16	None
Eligible Activities	Brownfields 10/16	Permit system can allow permit conditions to specify brownfield eligible activities on a site-specific basis, thus allowing more flexibility if desired. What is eligible can be defined in the permit as well (or instead of) by statute.
Work Plans	Brownfields 10/16	UOP or RP would replace need for work plan. Use of general permits can eliminate log jams. Permits would encompass all requirements in one document, and would not be piece meal.

FOR DISCUSSION ONLY
Prepared for Part 201 Discussion Group
Liability Committee
Rev. 1.0, Date: October 16, 2006
Prepared by Alan D. Wasserman

Complexity

Issue	Reference	Discussion
Number of cleanup criteria and exposure pathways	Attachment B 2(a)	Issue not directly addressed; however, permit conditions can be used as "off-ramps" so that specific criteria would not apply provided that condition is maintained. For example, no foundations or ordinary construction vapor barriers may remove indoor air pathway from permit.
Probabilistic risk assessment	Attachment B 2(b)	Issue not directly addressed; however conditions used to do a PRA can be reflected in permit conditions.
GSI Pathway	Attachment B 2(c)	Not addressed.
ARARs	Attachment B 2(d)	Not addressed
Improvement of use of air criteria	Attachment B 2(e)	A permit might be used to establish use conditions that obviate the need for the permittee to assess or address these criteria.
Goal of regulation and guidance	Attachment B 2(f)	Use of rules and guidance could follow formulas used in other permit programs (this does not necessarily solve the complexity problem)

FOR DISCUSSION ONLY
Prepared for Part 201 Discussion Group
Liability Committee
Rev. 1.0, Date: October 16, 2006
Prepared by Alan D. Wasserman

Program Administration

Issue	Reference	Discussion
Make relation between parties more of a partnership	Attachment B 3(a)	Permit paradigm changes the relationship two applicant / permit writer. This may or may not solve or improve this issue, but it changes things.
Balance between regulatory and service functions	Attachment B 3(a)	Permit paradigm, with different types of permits, actually unifies the role of DEQ. Service and regulation is provided through the same product. However, different types of products can allow for distinctions between the customers.
Reinforce distinction between liable and non-liable parties	Attachment B 3(a)	Permit distinctions can clearly delineate between what is expected of liable parties and others. The paradigm actually proposes that a liable party must get an RP. Other permits available for other types of customers.
Project scooping meetings?	Attachment B 3(b)	For site-specific permits, communications with the applicant can be made part of the process. This is done in other permit programs. Also, draft permit stage allows for applicant input (and public input).

FOR DISCUSSION ONLY
Prepared for Part 201 Discussion Group
Liability Committee
Rev. 1.0, Date: October 16, 2006
Prepared by Alan D. Wasserman

List of References

Brownfields 10/16: Brownfields Work Group (Draft 10/16/2006) questions and observations for discussion on October 16 (Amy Spay).
Liability 10/19: Liability/Compliance Workgroup -- Background and Proposed Discussion Topics (October 19 Meeting)(Mark Coscarelli)

Attachment A: Part 201 Discussion Group: DEQ Issue List for Phase II (Distributed September 29, 2006)

Attachment B: Part 201 Discussion Group: Summary , Recommendtations to Subcommittees, and Process Description (January 2006)

Status of Part 201 Workgroup Progress

Prepared for the Administration Workgroup

The following information is intended for the Part 201 Administration Workgroup to provide a current snapshot of the progress being made in other workgroups. This document is not intended to represent a final work product. Workgroups are continuing to meet and the recommendations for Part 201 will be developed further before the final report is completed.

LIABILITY/COMPLIANCE WORK GROUP

The Liability/Compliance work Group has centered much of its attention on ways to minimize the Baseline Environmental Assessment (BEA) process and shift emphasis to site assessment and due care plans for the purpose of liability protection. There is general agreement among work group members that the due care plans should become the basis for liability protection, and that they be approved by the MDEQ and periodically recertified (i.e., biennially).

Task-oriented subgroups have been organized to clarify and/or develop specific language related to:

- Exempt **owners** of residential units and common areas in a multi-use facility, (i.e., condominium or subdivision) from requirements under this part)
- **The statute of limitations** provision
- **Section 17 with an expanded authority** for MDEQ to request owner/operator's documentation when it appears that a reorganized Limited Liability Corporation (LLC) may be used solely to exploit the liability protection available under Part 201
- The definition of a "**Bona fide prospective purchaser"** and implementation of the definition to ensure that new owner/operators are not affiliated with liable parties if they seek liability protection under Part 201
- **"Diligent pursuit"** under section 14 complete with **deliverables** and a **time frame**
- Contribution rights under Section 26

Other topics being addressed in Liability/Compliance Work Group include the following:

- The need to restructure the Part 201 program to encourage and provide incentives for **increasing compliance rates** while relying on enforcement activities only when no other remedies are available. The ability of the MDEQ to levy administrative penalties without resorting to the Attorney General for enforcement action was identified as a potential deterrent that could enhance compliance rates. Another potential method to streamline site activities is to create rebuttable presumptions of liability in favor of the MDEQ, when more than one owner/operator has conclusively

used the contaminant in question at historic or legacy contamination sites (i.e., those owners/operators in control of sites before June 5, 1995).

- Develop a strategy to **communicate the true costs of limited closure** to a party that is seeking institutional or environmental controls as the basis for their liability termination. Institutional controls (ICs) frequently fail and environmental or engineering controls (ECs) are costly to maintain. If the true cost, over time, of funding the ICs and ECs were made known to the party seeking closure, source control or outright site remediation might prove to be a more attractive option. The need to quantify true costs of ICs and ECs is also an issue raised by the Complexity and Administration Work Groups.

COMPLEXITY WORK GROUP

The complexity workgroup has recognized that the current program complexity is a double-edged sword: While the various options and considerations under Part 201 make the program complex, these also provide greater flexibility to accomplish approvable remediation projects. The workgroup is focusing on ways to retain the flexibility where appropriate, but at the same time, reduce complexity. The following issues are being considered:

- The subgroup is developing a **comprehensive checklist** to help clarify and simplify the Part 201 process. The checklist would serve as an **intake form**, and be used throughout the project to **identify necessary information**, **narrow issues** that must be addressed, provide information to **eliminate pathways** that are not relevant, and **reach agreements** on key aspects of the project. The checklist would serve to develop and maintain a **project record** that begins with the initial meeting and is maintained throughout the project to ensure that decisions and agreements are clearly documented and can be relied on for the duration of the project. A draft of the checklist was presented and discussed at a subgroup meeting. Some members of the Administration Subgroup joined in this discussion.
- The workgroup has discussed how the use of the check list, early consultations, upfront agreements, expedited off-ramps, and other procedures to move the Part 201 program toward an **80-20 paradigm**, where 80% of the resources are spent on the most complex 20% of the issues, and 20 % on the remaining less complex issues (80%). While the 80-20 split is clearly theoretical, the concept of developing procedures to focus resources in the most productive manner is well accepted. The liability/compliance workgroup is also considering these issues.
- The workgroup is discussing approaches to address the ‘single issue problem’, where **remediation of an isolated incident** on a large site can be addressed with DEQ involvement without the whole site being a Part 201 facility. Such an approach would encourage DEQ involvement in these issues and lead to more timely and sound cleanup actions. A proposal for handling this issue was presented by the DEQ and is under review.
- GSI Utility Corridor Off-Ramp – This GSI pathway is often the most difficult and complex, and **utility corridors** add to the complexity. The workgroup is considering a simple model with generic and site specific inputs that could be used to promptly determine whether the GSI pathway is relevant or not.

- Mercury Variance – Surface water discharges are allowed a variance from the 1.33 ng/l **mercury water quality standard** to 10 ng/l, but DEQ has not authorized a similar variance for groundwater plume venting. The workgroup is considering approaches to authorize this variance for venting groundwater plumes.
- **Groundwater Not-in-an-Aquifer** Issue – Groundwater as a drinking water source should not be a relevant pathway where the groundwater is not in an aquifer. The DEQ is developing an Op Memo on this issue and has discussed it with the workgroup. Issues and concerns will be considered by the DEQ as part of the peer review process for Op Memo development.
- **Groundwater venting** to storm sewers regulated under the NPDES stormwater program should be handled in a similar manner to other discharges to the storm sewer and qualify for mixing zones at the point of discharge to surface waters. The DEQ has presented an approach to address this issue which is under review by the workgroup.
- Like the administration workgroup, this workgroup has identified concerns with the **QRT process**, but the workgroup has not discussed this issue in detail. The QRT process will impact how various recommendations are implemented, so it is important that it be considered.
- Reducing the number of **land use categories** to two: residential and nonresidential, or unrestricted and restricted. This reduction in complexity appears to be appropriate with minimal impact on program flexibility. The workgroup is discussing how to implement such a change.
- The DEQ expressed concern that the current **indoor air criteria** and/or procedures are not adequately protective. The DEQ compared Michigan's criteria/procedures with other states and presented concerns about the current Part 201 Indoor Air Pathway process. The DEQ has presented possible revisions to the methodology and the criteria which are under review for discussion at future subgroup meetings.

BROWNFIELD WORK GROUP

Consensus has been reached in the work group that the Brownfields Program should be reauthorized. The program's current purpose is to facilitate the redevelopment of sites that are contaminated, blighted, or functionally obsolete. The work group suggests the following change to the purpose statement of the Brownfields Program: *To promote and facilitate the revitalization, redevelopment, and use of certain property that is contaminated (real or perceived), blighted, or functionally obsolete.*

In addition, the work group has focused on:

- The possibility of developing **scoring criteria** for work plans, grants, and loans that would help balance the environmental, economic, and returns on investment measures as well as include how important a project is to the community. A more transparent model will benefit the agencies and the private sector.
- Emphasizing **early consultation** between private parties and the state in Act 381 work plans and redevelopment projects by initiating a scoping meeting with brownfield redevelopment specialists from each relevant agency, the developer, and the local unit of government.

- The 381 **work plan approval process must be simplified** and/or streamlined in order to secure financing of a project. The workgroup members are discussing ways to do this as well as expand the number of accepted eligible activities costs (including consulting fees and interest).
- Recommending the **creation of a brownfield "one-stop shop"** for state assistance, using a single application. This "uni-application" would include enough information about the project to support the review by the Michigan Economic Development Corporation (MEDC), the MDEQ, and other relevant agencies for consideration of 381 work plans, grants, loans, Tax Increment Financing (TIF), tax credits, or other brownfield incentives that may be available. The unified application would be the starting point of discussion during the scoping meeting with the brownfield redevelopment specialists from each agency and will help identify the programs and incentives for which the applicant may be eligible and encouraged to apply.

FOR DISCUSSION ONLY
Prepared for Part 201 Discussion Group
Liability Committee
Rev. 1.0, Date: October 5, 2006
Prepared by Alan D. Wasserman

Conceptual Framework For Changing to An Environmental Cleanup Permit Program

Overview

- Retain liability standard
- Retain ordinary transaction due diligence standards
- Require permits as controlling documents
- Permits replace BEA and due care plans, and portions of RAP, interim response, and IRDC plan components.
- Permits contain O&M requirements
- Permit requirements replace institutional control requirements for property covered by permit.
- Permit identifies the relevant criteria and performance standards.
- Five year renewable permits
- Permits can be transferable.
- Two types of permits: Remediation Permit and Use/Occupancy permit. Remediation permits are for cleanups. Use/Occupancy covers due care and use restrictions. Use includes owning fee or land contract interest.
- Allow general permits/certificate of coverage methodology for appropriate recurring situations. (such as small spill cleanups)
- Enforcement
    - Civil Penalty for failure to get permit / permit violations
    - Cost recovery still available against liable parties
- Any interests in property that are not "use or occupancy" would NOT require a permit… eliminates "lender" liability. Upon foreclosure, a lender would have to obtain an assignment of existing permit or get its own permit related to use upon foreclosure.
- Provides more compatible framework for working with requirements from air/water permit programs.
- Emphasis on performance instead of plans

Liability Scheme

Liable Parties: The liability of a person can still be determined in the same was as current law (responsible for an activity causing a release). Liable parties are liable: (1) for response activity costs incurred by the State or any other person; and (2) for obtaining

a remediation permit. Failure to apply for a Remediation Permit would subject the liable party to fines or penalties. Compliance with an RP would bar cost-recovery and obviously would shield against civil fines and penalties.

Non-liable parties: A Use/Occupancy Permit ("UOP") will generally be required of any non-exempt person who uses or occupies a "facility" (except possibly in the case of migrating groundwater). Use or occupancy will need to be defined, but the intent is that every tenant or owner of a facility should be covered by a UOP permit. Failure to apply for a UOP permit would subject the person to fines and penalties. A UOP can include additional response activities if the permittee wishes to eliminate some permit conditions pertaining to use. Compliance with a UOP would be a shield against civil fines and penalties. Some consideration should be given as to whether to require a UOP in situations where the only issue is the migration of contaminated groundwater. Currently, persons in that position are not liable for response costs nor for due care (26(4)(c)) Because of the property rights at issue, it is probably better to make a UOP optional in that case. Possible exemptions to the UOP requirement include residential users (similar to 26(3)(f) and owners of certain types of easements (for transportation, etc).

Cost Recovery: "Response activity" needs to be redefined so as to be limited to response activities done pursuant to permit. After these changes come into effect, response activities that are not done pursuant to a permit are not recoverable under the statute.

Grandfather: A transition must be made to the new program. Permits should be required within a specified time frame (perhaps one year) for any ongoing response activities except for those that meet the current definition of "complete" before the permit requirement kicks in. An exception might be needed for response activities that are governed by consent judgments or that are otherwise under court supervision.

Due diligence: The liability structure regarding innocent purchasers and due diligence should remain. A person who does the appropriate environmental due diligence under the current standards, and who is an innocent purchaser, would not be subject to fines or penalties for failure to get a UOP. However, if it is subsequently determined that the property is a facility, the permit requirement would kick in at that time. We should also conform the existing due diligence scheme to CERCLA "all appropriate inquiry" so that "one size fits all" for transaction screening studies. If due diligence shows the property is a facility, the person will be subject to the UOP requirements (including fines and penalties for failure to get a UOP).

Notice on Transfer: Permits (and statute) can include a provision that any permittee provide notice and a copy of permit to transferee. UOP permit should be transferable with an affidavit that uses will be consistent.

Permit Application

The information required in the application should be sufficient to establish general and specific permit conditions. The level of information and detail required will be different for each type of permit.

Remediation Permit Appplication(RP)

- Five year renewable permit
- Required for all liable parties; optional for any one else
- Identify list of contaminants of concern (anything above generic residential criteria). Certify that at time of application, no other known contaminants present.
- Identify type of land-use, and conditions needed to protect users. Permit must be consistent with current land use.
- Identify relevant exposure pathways.
- Identify any other permits already in place for the facility.
- Identify any interim response issues known at time of application (abandoned drums, imminent hazards, fire or explosion hazards)
- Include any reports or data available regarding contamination.
- Propose conceptual response plan (so appropriate permit conditions can be drafted). For example, pump and treat plus containment for groundwater, capping, etc. Note: The idea is to have enough information to draft conditions that must be met in the permit, not to "approve" the selection of an approach.

Permit Content

Emergency Response Permit (ERP)

- Special, limited permit intended to allow streamlined or general permit for immediately addressing emergency situations, such as spill response, fire or explosion hazards, or immediate dangers.
- Should be a general permit that can be obtained through a certificate of coverage.
- Should be able to file certificate of coverage AFTER taking actions as allowed under general permit (can have required time frame).
- General conditions: Allow taking of appropriate actions to eliminate or mitigate threat.
- Does not substitute for or eliminate need for RP or UOP.

Remediation Permit

- List of chemicals of concern and applicable criteria for the facility
- Obligation to implement conditions and requirements of the permit to meet applicable criteria.
- For soils, performance standards should be elimination of pathway or attaining criteria by removal, treatment in place, or barriers.
- For groundwater, performance standards can be halting migration and/or meeting criteria through pump and treat, in place treatment, attenuation, or barriers and use restrictions. Impacted water supplies must be replaced by permittee.
- Deadlines to demonstrate through an approved performance monitoring plan that the applicable criteria are met. This deadline can be amended if during the permit term a different deadline is proposed and accepted by DEQ. Deadlines should be established like BAT – based on professional judgment of how long it should take based on the identified conditions. For example, short deadlines may be appropriate for capping a soils only problem or where a remedy is going to rely primarily on observance of permit conditions related to use of property. Long deadlines may be appropriate for groundwater remedies.
- Compliance is measured by:
    - Timely submittal of deliverables.
    - Completion of response activities on schedule identified in permit.or approved deliverable
    - Attaining criteria as listed in the front of the permit and as shown in performance monitoring report(s).
- Interim Response Assessment / Implementation Schedule (if needed)
    - If assessment is needed, require assessment and report within __ days.
    - Require construction of appropriate interim response measures (as per Rule 526(2)) within ___ days.
    - Require interim response implementation report within ___ days.
- Response Activities permitted: The permit should contain conditions (can be general) that permits response activities at the facility intended to meet criteria identified in the first part of the permit.
- Performance Monitoring Report: This is the report that should show the identified criteria have been met, along with any applicable permit conditions regarding use restrictions etc. A PMP that demonstrates that generic residential criteria are met can terminate a permit and the need for anyone else to get or hold one. Otherwise, even if no active remediation is required, a permit will be needed to require the conditions related to use and operation and maintenance be observed. After the PMP, it may only be necessary to file response activity reports if remedy is in the O&M plus use restrictions phase.

- Response Activity Report: (like DMRs) – periodic report (quarterly?) of response activities taken to meet criteria and permit conditions. Note that response activity report should be required to be submitted by the person performing response activities, and a certification for whom the response activities were performed. . The report would include: new response activities undertaken (if any), monitoring results, new data, and/or operation and maintenance activities, inspection reports, etc.

User/Occupancy Permit

- Identify contaminants of concern and applicable criteria
- Sets forth the conditions for meeting due care obligations. Removing drums, closing USTs, installing barriers, prohibiting or restricting use of groundwater, and general description of allowed (or prohibited) uses consistent with due care.
- Notification of off-site migration (as per rule) to be provided by Licensee to DEQ.
- Response Activity Report: (annually?) documents monitoring and maintenance of permitted due care activities (inspection reports, etc).
- Additional Response Activities: Licensee can apply for additional response activities if desired, either with initial application or as an amendment. Additional Response Activities may lead to the addition to the permit of a PMP.

Special Situations

What should happen if there is more than one liable party?

Permits are required for each party. If one liable party has already obtained a permit, the same permit should issue to each other liable party that applies. The requirements of the permit are enforceable against each liable party. A liable party that does not perform the permitted response activities: (1) is liable for cost recovery from the party that did perform the activities, and (2) is subject to fines, penalties and enforcement from DEQ for failure to meet permit requirements. The Response Activity Report should make it clear which liable parties have done the work.

In order to handle multiparty sites and disputes, the following process could be followed:

- If only one liable party applies for a permit, that liable party gets cost recovery against other non-participating liable parties, and a judicial claim for fines and civil penalties against them.

- If more than one liable party applies for a permit for the same facility, then the permit issued to each should be the same, with a default provision in each permit that specifies a proposed cost allocation (per capita). This allocation can be reviewed and adjusted in a contested case proceeding. The final allocation can be used to adjust past costs in a settlement or if needed, after judicial action on a cost recovery claim.
- Permit conditions are jointly and severally enforceable against any liable party permittees without regard to the proposed allocation.
- There should be a general permit and buy-out provision for "de minims" liable parties. Once a de minimis party has "bought out" of a site, the general permit and de minims buy out provisions should immunize that party from cost recovery or further action regarding that site. The general permit would continue until the site was cleaned up.

What should happen if the liable party is not the owner, or is not the only owner or occupant of a facility?

A facility can have both a UOP (for non-liable parties) and a RP (for liable parties). A UOP will include general provisions that require access be provided to the DEQ or an RP to perform response activities under an RP. An RP will include general provisions that protect the property rights of persons using/occupying the property. Conflicts should not be significant unless there is a change in use. In this case, there are two solutions. One is that whoever obtains the first permit obtains the right to continue a permit consistent with that use. So, if an RP is established for a facility, which is then sold/occupied by another, that person's UOP will identify the prior RP and use restrictions as applicable.

What should happen for off-site contamination?

The RP should cover the entire facility, regardless or property lines. Every parcel within the facility will need a UOP unless an exemption applies.

Is there still a role for institutional controls?

Probably. Institutional controls, especially ordinances, may be needed to cover facilities that are exempt from the permit requirements.

Review

- Permits would be reviewed under APA contested case procedures.
- Court action could be sought to enforce obligation to obtain permit or for fines or civil penalties.
- Court action available for cost recovery claims.

Public Involvement

- RP should have some comment procedure as draft NPDES permit
- UOP should not need public involvement.

Enforcement

Fines and penalties should be different for RP and UOP. Fines should be stiff for RP to induce liable parties to apply for one. Fines for UOP should be large enough to induce compliance, but not so large as to be punitive.